Office-Supreme Court, U.S.
FILED
MAY 4 1962
JOHN F. DAVIS, CLERK

No. [redacted] 103

In the

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

T. K. IRWIN, JR.,

IRWIN AND IRWIN, *Attorneys,*
215 Mercantile Continental
Building,
Dallas, Texas RI 1-1411
Attorneys for Petitioner.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

INDEX

	Page
OPINIONS BELOW	1-2
JURISDICTION	2
QUESTIONS PRESENTED	2-3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT	3
I. When and How the Federal Constitutional Questions Were Raised	2
II. The Proceedings in the County Criminal Court of Dallas County, Texas	4-5
III. The Decisions of the Texas Court of Criminal Appeals	5
REASONS FOR GRANTING THE WRIT	6-8
CONCLUSION	9
APPENDIX A:	
Amendment 14, Section 1, United States Constitution	11
Article 424—Code of Criminal Procedure of the State of Texas	11
Article 425—Code of Criminal Procedure of the State of Texas	11
Article 426—Code of Criminal Procedure of the State of Texas	12
Article 433—Code of Criminal Procedure of the State of Texas	12
Article 434—Code of Criminal Procedure of the State of Texas	13
Article 436—Code of Criminal Procedure of the State of Texas	13-14

Page

Article 437—Code of Criminal Procedure of the State of Texas 14-15

Article 438—Code of Criminal Procedure of the State of Texas 15

Article 439—Code of Criminal Procedure of the State of Texas 15

Article 440—Code of Criminal Procedure of the State of Texas 15-16

APPENDIX B:

Opinion by Morrison, Judge 17-18

Dissenting Opinion, Woodley, Judge 19-20

Opinion, Woodley, Judge 21-23

Opinion, Dice, Judge 24-26

APPENDIX C:

Second Motion for Rehearing Overruled Without Written Opinion 27

APPENDIX D:

Order Staying Issuance of Mandate 29-30

Page

Cases

Burgemeister v. Anderson, 259 S. W. 1078 6

Cooke v. United States, 267 U. S. 517 8

Lisenba v. People of California, 314 U. S. 219 6

Snyder v. Commonwealth of Massachusetts, 291 U. S. 97 7

Turner v. Commonwealth (Ky.), 188 S. W. 404 7

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Myrph Johnson, an illiterate, Negro male, prays that a writ of certiorari issue to review the final judgment of the Court of Criminal Appeals of Texas, entered in the above-entitled cause.

OPINIONS BELOW

This cause was originally reversed and remanded by the Texas Court of Criminal Appeals. Thereafter, this order was withdrawn and the Court has rendered three other majority opinions and one dissenting opinion, finally affirming judgment against Petitioner without written opinion.

These opinions are not yet reported, but all of the opinions, other than the one withdrawn, are printed in the Appendix hereto, infra pages 17-27, and likewise appear in the Record.

JURISDICTION

The Court of Criminal Appeals of the State of Texas is the Court of last resort in Texas in all matters within its jurisdiction. Its judgments and orders are not reviewed by the Texas Supreme Court, or by any other Texas Court. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1257 (3)*.

QUESTIONS PRESENTED

Whether Petitioner was denied due process of law and equal protection of the laws when, while serving a jail sentence, and after a conditional bond forfeiture had been entered against him, had final judgment of forfeiture rendered at a hearing, when:

a. Petitioner (a principal "party" to the suit) was given no notice of the hearing.

b. When Petitioner was not present during the presentation of the case against Petitioner.

c. When Petitioner was not present during the presentation of his sureties' defense except when he, Petitioner (although a "party" to the suit) was brought from jail and testified only as a "*witness*" in the cause, and was immediately thereafter, *by direct order of the Trial Court*, returned to jail; and, *in his involuntary absence*, other evidence was heard.

d. When Petitioner was not advised by the Trial Court holding the hearing that he was a "party" to such proceedings, and was entitled to be represented by counsel, to call witnesses, and to argue in his own behalf.

e. When Petitioner was not present before the Court when final judgment was rendered against him by the Trial Court, he having been taken from the Court, prior to the pronouncement of judgment, by the bailiff of the Court, and returned to jail by direct order of the Trial Court.

Whether under the peculiar facts of this case, the Petitioner has been accorded that fundamental fairness necessary to the administration of justice and due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent statutory and constitutional provisions are printed in the appendix beginning on pages 11-16.

STATEMENT OF THE CASE

I. When and How the Federal Constitutional Questions Were Raised.

The federal constitutional questions were first raised in the County Criminal Court of Dallas County, Texas, on Petitioner's Motion for New Trial, after discovering that final judgment of bond forfeiture had been rendered against him, without notice and in his absence (R. 16-25) (Bill of Exception No. 3). Exception was taken in that Court to the overruling of the Motion (R. 26). The federal constitutional questions were thereafter urged, at each stage, on appeal (R. 114-141, R. 211-214, R. 218-222).

II. The Proceedings in the County Criminal Court of Dallas County, Texas.

The Petitioner, after judgment nisi (in Texas a "conditional" judgment) was entered on his failure to appear for trial, thereafter, and *before entry of Final Judgment of Bond Forfeiture*, surrendered, was tried for Driving While Intoxicated and on his plea of guilty, sentenced to thirty (30) days confinement in jail and fined Fifty Dollars ($50.00) and costs. The Petitioner was serving this sentence when the "statutory hearing" on the Final Forfeiture was had (Code of Criminal Procedure, Art. 437, appendix, infra, page 14). After the State had presented its evidence, and after the sureties, who had filed a written answer, setting up, among other things, the surrender and trial of Petitioner, had examined one witness, Petitioner was brought from the County Jail and examined as a "witness" by both the sureties and the State. Immediately after he finished testifying as a "*witness*", he was; by direct order of the Trial Court returned to the County Jail, and the hearing then proceeded, in his absence, and resulted in entry of Final Judgment of Forfeiture. Petitioner was not represented at the hearing by counsel and was not informed by the Court that he had a right to be present and participate in the hearing on its merits, nor was Petitioner advised that he was a "party" to the proceedings, that he was entitled to counsel, if he so chose, that he was entitled to call witnesses, or argue in his own defense. The Statement of Facts in the bond forfeiture hearing (R. 45-113A) reflects the testimony heard, but does not reflect

all of the facts complained of by Petitioner, and such facts are set out in Petitioner's *Bill of Exception No. 3*, (R. 35-40), and which Bill of Exception No. 3 was approved and allowed by the Trial Court with explanation (R. 41-42). *A reading of Bill of Exception No. 3, as allowed and approved by the Trial Court, will give all of the facts surrounding the matters pertinent to this Petition.*

III. The Decisions of the Texas Court of Criminal Appeals.

On appeal, the Court of Criminal Appeals of Texas, originally reversed and remanded Petitioner's case. Thereafter, this order was withdrawn, and the judgment of forfeiture was ruled excessive by Five Hundred Dollars ($500). This opinion was delivered June 14, 1961, with a dissenting opinion by the presiding judge (R. 190-194, appendix, infra, pages 17-20). Thereafter, on the State of Texas' Second Motion for Rehearing, the forfeiture as to Petitioner was affirmed in its full amount (R. 208-210, appendix, infra, pages 21 to 23). Thereafter, on Petitioner's Motion for Rehearing wherein Petitioner again raised constitutional questions, the Court affirmed the full forfeiture against Petitioner, but without in anywise discussing the constitutional questions presented in his Motion for Rehearing and in this Petition for writ of certiorari (R. 215-217, appendix, infra, pages 24 to 26). Thereafter, Petitioner filed a Second Motion for Rehearing, again raising the constitutional questions (R. 218-223), but the Court of Criminal Appeals overruled this Motion without written opinion on February 14, 1962.

REASONS FOR GRANTING THIS WRIT

1. Petitioner had adjudged against him a bond forfeiture in the amount of $750.00, the full amount of his bond, without being accorded a "hearing" conducted with that fundamental fairness necessary to the due administration of justice, *Lisenba v. People of California, 314 U. S. 219.*

The Supreme Court of Texas, in *Burgemeister v. Anderson, 259 S. W. 1078*, held that the Statutes of the State of Texas pertaining to bond forfeitures, appendix, infra, pages 11-16 "admit of no other construction than that the principal is a "party" to the judgment nisi *and all subsequent proceedings*, and is both required and *entitled* to show any good and sufficient cause why the interlocutory judgment should not be made final." The Court, speaking through Justice Greenwood, further stated "By the judgment nisi the Court acquires jurisdiction to adjudicate the matter of enforcing the Principal's obligation to the State, as well as that of the sureties, and, on the Principal's appearance and tender of issues excusing his failure to appear at the time of forfeiture, *the statutes entitle him to both a hearing and a determination* as to whether the judgment nisi shall be vacated in whole or in part or shall be made final."

2. After Petitioner surrendered and was tried, his sureties filed an Answer as provided by State Statute setting up such surrender and conviction, and asking for a remission therein provided. The pleadings of Petitioner's sureties, not being separate or personal to these sureties, but going into the whole question of remission because of the prior sur-

render and trial of the Petitioner, was a defense available to, and operated in favor of Petitioner. *Turner v. Commonwealth (Ky), 188 S. W. 404.* Articles 436, 437, 438, 439 and 440, Code of Criminal Procedure of the State of Texas, appendix, infra, pages 13-16.

3. The Petitioner, under the Texas Statutes, being entitled to a fair hearing, the Trial Court in holding the hearing in the manner set out herein, and without advising the Petitioner of his rights, has been denied due process of law. Petitioner unquestionably had a right to be heard, to call witnesses, to be represented by counsel, and to argue to the Court in his own behalf; but, not being advised that he was even a party to the proceedings, the hearing held, principally during his *involuntary* absence, was not a hearing in accordance with due process of law. This Honorable Court has asserted that the right to be present when the Petitioner's presence has a reasonably substantial relation to the opportunity to be heard, and his right to be confronted with witnesses, is consonant with due process of law under the Fourteenth Amendment to the United States Constitution. *Snyder v. Commonwealth of Massachusetts, 291 U. S. 97.*

4. The right to a hearing required a judicial examination of every issue that, according to established procedure, may affect the attainment of a legal trial, and in such trial determine the cause according to law. This includes the opportunity to cross-examine witnesses and to produce witnesses and to be heard on question of law, in person or by attorney. These rights were denied Petitioner. Attention is

specifically called to Article 426 of the Code of Criminal Procedure of the State of Texas, which provides that *citation* or *notice* at the time that the conditional forfeiture is entered need not be issued to the Principal on a bond. The Petitioner, being the Principal on the bond involved, was not served with any type of notice and, when he was brought into Court by the bailiff, in a proceedings in which he was a "party", was entitled to notice from the Trial Court as to the nature of the proceedings then going on, and Petitioner says that the Court further should have advised him of his other legal and constitutional rights in order that he might have an opportunity to present his proper defense. *Cooke v. United States, 267 U. S. 517.*

5. The amount in controversy is not a substantial sum. The expenses incident to the appeal to the Court of Criminal Appeals of Texas and of this Petition for a writ of certiorari far exceed the final judgment of forfeiture, that is, $750.00; however, it is not the amount of money involved in this case, but the constitutional rights that every citizen has, and which should be protected. The Petitioner, an illiterate Negro, by being brought into Court from jail, examined for the benefit of other parties, forcibly removed from the courtroom, and without notice that he was a party to the proceedings, and without being advised of his rights, has been deprived of due process of law. The question in this case is not whether the granting of these rights to Petitioner would have lead to a different judgment, but due process requires that a reasonable opportunity for exerting these influences on the Court's judgment be afforded. *Cooke v. U. S.*, supra.

CONCLUSION

For the reasons stated, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

T. K. IRWIN, JR.,

IRWIN AND IRWIN, *Attorneys*,
215 Mercantile Continental
Building;
Dallas, Texas RI 1-1411
Attorneys for Petitioner.

April, 1962

CERTIFICATE

I hereby certify that the facts set forth in the above application are duly verified by T. K. Irwin, Jr., Petitioner's attorney, who has been duly admitted to practice before the Supreme Court of the United States; and I further certify that a copy of the foregoing petition for a writ of certiorari was deposited in the United States mail, properly addressed and stamped, to the Attorney General of the State of Texas.

T. K. IRWIN, JR.